IN THE SUPREME COURT OF MISSOURI

JOHN DOE 1631, Plaintiff/Appellant, vs. QUEST DIAGNOSTICS, INC., LABONE, INC., and QUEST DIAGNOSTICS CLINICAL LABORATORIES, INC. d/b/a QUEST DIAGNOSTICS, Defendants/Respondents.	)	No. SC92790 Appeal from the Circuit Court of the City of St. Louis Cause No. 0822-CC07710

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Appellant, John Doe 1631, appeals the Judgment of the Circuit Court of St. Louis City in favor of Respondents, Quest Diagnostics, Inc., Labone, Inc., and Quest Diagnostics Clinical Laboratories, d/b/a Quest Diagnostics, on Doe's claims of breach of fiduciary duty and wrongful disclosure of Doe's HIV test results without his consent or authorization under Section 191.656 of the Missouri Revised Statutes. (LF[1] 185-187; 274-278).

Appellant asserts that the Circuit Court improperly submitted Instruction No. 6, the verdict director in his claim for breach of fiduciary duty, because it required a showing of negligence. Under Missouri law, the claim of breach of fiduciary duty does not require an element of negligence and the Circuit Court's decision with respect to this instruction should be reversed.

Appellant also asserts that the Circuit Court improperly submitted Instruction No. 9, the affirmative defense to Appellant's claim for wrongful disclosure of his HIV test results pursuant to § 191.656, RSMo. Both §191.656, RSMo. and HIPAA, 42 U.S.C. § 1320d-7(a), require written authorization before confidential health and medical

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[1] Appellant uses the following abbreviations herein:

"LF" = Legal File

"TR" = Trial Transcript

"A1" etc. = Appendix

"SLF" = Supplemental Legal File

information may be disclosed, and no evidence was adduced at trial that such authorization was given, thus the Circuit Court erred in submitting the instruction to the jury and should be reversed.

Finally, Appellant asserts that the Circuit Court erred in granting Quest Diagnostics, Inc.'s motion for directed verdict, because a submissible case as to the liability of the parent company was overwhelmingly supported by the legal and substantial evidence.

The issues on appeal involve errors committed at trial by the Circuit Court. Appellant Doe appealed the Circuit Court judgment to the Missouri Court of Appeals, Eastern District. The Court of Appeals affirmed the Circuit Court and denied Appellant's application for transfer. This Court granted Appellant's application for transfer on September 25, 2012. Accordingly, this appeal is within the jurisdiction of the Missouri Supreme Court pursuant to Article V, Section 10, of the Missouri Constitution.

STATEMENT OF FACTS

Appellant's Claims

Appellant, John Doe 1631 ("Doe"), an HIV-positive male who resides in Missouri, filed his Amended Petition in the Circuit Court of St. Louis City against Quest Diagnostics, Inc., Labone Inc., and Quest Diagnostics Clinical Laboratories, Inc. d/b/a Quest Diagnostics ("Quest" or "Quest Diagnostics") after Quest disclosed Doe's confidential HIV test results to his employer without his authorization. (LF 12). Appellant's Amended Petition, alleges the following counts:

Count I: Violation of § 191.656, RSMo.;

Count II: Breach of Fiduciary Duty;

Count III: Invasion of Privacy; and

Count IV: Intentional or Negligent Infliction of Emotional Distress;

(LF 12-20).

Evidence Adduced at Trial

In July 2006, Doe was under the medical care of Dr. Matthew German, his primary care physician and HIV specialist. On July 24, 2006, Dr. German ordered certain laboratory tests to be performed on Doe's blood. (TR 362). Such testing is ordered by completing a document known as a "requisition," which is a written document providing orders to the diagnostic testing laboratory (such as Quest Diagnostics) as to what tests are to be performed and instructions as to how the results are to be reported. (P's Ex. 1 (A23); TR 218). On July 24, 2006, after Doe departed from a visit to Dr. German's office, Doe realized that he forgot to take his usual requisition form with him—he would need it to have his blood drawn—so he called the medical assistant from Dr. German's office, Faith Mustone. (TR 218-19; 363-64). Ms. Mustone asked Doe if he would like to return to the doctor's office to get a requisition form or if he would prefer that she fax one to him at the Wayman A.M.E Church, where Doe worked as a personal assistant to the pastor. (TR 218-19; 353; 363-64). Doe asked that the requisition be faxed to him at the church. (TR 218-19; 363-64).

For the last eight years, Faith Mustone has worked for Dr. German and other doctors in Dr. German's medical group. (TR 213-14). As part of her duties and responsibilities as a medical assistant, Ms. Mustone completes laboratory requisitions,

including requisitions for testing by Quest Diagnostics. (TR 214-15). Ms. Mustone wrote "faxed to 361-5358" diagonally on the face of Doe's requisition form, because Doe asked her to fax it to him at that number—Doe told Ms. Mustone he would wait at the fax machine for the fax to arrive. (P's Ex. 1 (A23); TR 219; 364).

The area on the requisition form where Ms. Mustone made the phone number notation is the area she would ordinarily provide instructions about additional tests the doctor would like performed. (TR 220). Below that section of the form, there is another section where a doctor may specifically request the test results be faxed to a telephone number. (P's Ex. 1 (A23)). In that particular section, there is a box the doctor may check next to the words "Fax Results to: ( ) . . ." (P's Ex. 1 (A23)). Ms. Mustone did not check this box or write a phone number in the space provided. She testified that her notation in the space above was to memorialize something she had already done, and it was not her intention to have Quest Diagnostics fax Doe's test results to the number she wrote down. (TR 220). After receiving the faxed requisition form, Doe immediately went to Quest Diagnostics to have the blood work ordered by Dr. German. (TR 365). When Doe arrived at the Quest facility, he submitted to the blood draw in a routine manner and left. Doe did not return to work that day and thereafter, he went on vacation for approximately seven days. (TR 365-66).

Stella Grodzinskaya, a Patient Services Supervisor for Quest Diagnostics, Inc., (TR 241; LF 216), testified that when patients come to a Quest facility, they give the phlebotomist the requisition form, and the phlebotomist enters the information on the form into the Quest computer system, called "Care 360." (TR 247-48). The

phlebotomist normally checks with the patient to ensure the patient's personal information is correct (i.e., name, birth date, social security number, etc.), but does not check with the patient about where the test results will be sent. (TR 249). The phlebotomist prints out a computerized requisition form which contains the information he or she entered into the Care 360 computer system and then rubber stamps the form with a box image containing spaces for employee initials. (LF 202; TR 250-51). The original requisition form is also stamped, and in this case it was stamped in the same space where Faith Mustone wrote the notation, "faxed to 361-5358." (LF 201; TR 251-52).

The phlebotomist, Mary Petty, testified that she worked for Quest Diagnostics at the facility visited by Doe on July 24, 2006. (TR 438). Ms. Petty's initials "MP" appear in the stamped boxes on both forms, indicating that she was the phlebotomist who drew Doe's blood that day. (P's Ex. 1 (A23); LF 202; TR 253). Ms. Petty interpreted the notation made by Faith Mustone on the original requisition form, "faxed to 361-5358," as a request to fax the results to the number indicated, so she entered the directive "FAX 361-5358" into the Care 360 computer system. (TR 285 & 444-50; LF 202). The directive "FAX 361-5358" then appeared on the computerized requisition form in the "Internal Comments" section. (LF 202; TR 295). Ms. Petty testified that although Doe was sitting there with her while she entered the data, she did not discuss Faith Mustone's notation, "faxed to 361-5358" with him to clarify whether or not her interpretation of the notation was correct. (TR 451-53). Notably, Ms. Petty called Dr. German's office that day and actually spoke to Ms. Mustone. (TR 261; LF 203). But Ms. Petty did not call

the doctor's office to clarify whether or not her interpretation of the "faxed to 361-5358" notation was correct—she called to confirm Doe's insurance information. (TR 261-62; LF 203).

Mary Petty's supervisor was Stella Grodzinskaya. (TR 241; LF 216). Ms. Grodzinskaya also testified that after the patient's blood is drawn, the phlebotomist writes the patient's name on the specimen, initials the computerized requisition forms in their respective stamped boxes, places the specimen into a bag along with both requisition forms, and sends them to the main laboratory to be tested. (TR 249). The blood specimens are sent to the main laboratory via courier and, once there, they are tested and processed. (TR 288; 293).

Doug Hamilton, the Operations Director for Quest Diagnostics, Inc. (TR 287), oversees the "order entry" responsibilities at the main laboratory. (TR 288). Mr. Hamilton testified that when the blood specimens reach the main laboratory, a processor verifies the data on the two requisition forms that arrive with the specimens. (TR 294). The processor in this case would have had both requisition forms to examine—the manual requisition form that contained Faith Mustone's notation, "faxed to 361-5358" and the computerized requisition form created at the Quest patient services center by Mary Petty that contained the directive "FAX 361-5358" in the "Internal Comments." (TR 300-01; LF 201, 202). Even though the notation on the original requisition form was spelled in the past tense, "F-A-X-E-D," Mr. Hamilton testified that a processor wouldn't have a reason to believe an error had been made, because it was "pretty clear that a fax has been requested." (TR 300-01). The processor would have had a telephone

available to him or her to call the doctor's office in order to verify what was meant by the fax request, but Mr. Hamilton testified there wasn't "any reason to question it." (TR 299). Mr. Hamilton also testified that because the phone number indicated in the computerized requisition form was only seven characters, and the computer requires eleven characters to generate a fax of test results, the processor at the main lab would have been prompted by the computer to "satisfy those remaining characters." (TR 296-97). The processor would have been prompted to "put in an area code that they're confident is correct." (TR 296-97). In any event, according to Mr. Hamilton, the Quest Diagnostics computer system interprets the word "fax" and the word "faxed" the same way. (TR 312). In fact, Mr. Hamilton admitted that the Care 360 computer system would even interpret the words "don't fax" as a directive to fax the test results to the indicated telephone number even though it may be contrary to the intent of the doctor. (TR 312). Mr. Hamilton testified at length about Quest Diagnostics, Inc.'s policies and business practices with respect to the disclosure of confidential information and admitted that Quest is responsible for protecting the private health information of its patients through its Notice of Privacy Practices. (TR 289-90 & 303-07; LF 212-15).

On July 25, 2006, the day after Doe's blood draw, the Quest Diagnostics computer system generated two faxes consisting of two pages each that contained Doe's confidential HIV test results. (LF 208-11). The computer system transmitted the faxes to Doe's place of employment, the Wayman A.M.E. Church. (TR 308). Doe would not return to work for six more days. (TR 366).

The two faxes sent to the church consisted of two laboratory reports, each with a cover page. (TR 308-10). The test result pages contain three references to HIV, and other references to lymphocyte subset panel, helper cells, and suppressor T cells. (LF 208 & 210; TR 310). The cover pages of the test results state, "WARNING: THIS FAX CONTAINS CONFIDENTIAL MEDICAL INFORMATION. . . If the reader of this warning is not the intended FAX recipient or the intended recipient's agent, you are hereby notified that you have received this message in error and that review or further disclosure of the information contained in this FAX is strictly prohibited." (TR 309-10 & 315-16; LF 209 & 211). Yet the name of the intended recipient is not on the cover page; the reader of the fax must go to the second page—to the confidential test results—to determine the name of the person listed on the report. (TR 309-10 & 315-16; LF 209 & 211). There's no dispute that someone at the church would have had to look at the test result pages to determine that the intended fax recipient was Doe, because when Doe returned to work following his week-long vacation, his HIV test results had been removed from the fax machine and placed in his in-box. (TR 309-10 & 366). The test results were on top of all the other documents in his in-box, face up, and on top of documents with more recent dates. (TR 368-69). Many church members and employees had access to both the fax machine and Doe's in-box, because both were located in an open area. (TR 359-60). Doe immediately examined the reports, and after realizing they had been sitting out in the open since the day after he went on vacation, he began to cry. (TR 368).

In January 2007, approximately six months after Quest sent the faxes to the church, Doe was terminated from his position as personal assistant to the church's pastor, Rev. Dr. Timothy Tyler. (TR 354). Rev. Tyler already knew about Doe's HIV status, because Doe had confided in him on a previous occasion, and Doe would remain a volunteer at the church as a church steward. (TR 351, 370, 376). Rev. Tyler told Doe that he was being laid-off for financial reasons. (TR 355).

During the six months following Quest's transmission of the test results to the church, and prior to his termination, Doe received several hateful anonymous phone calls. (TR 373). In at least two of the calls, the caller specifically referred to Doe's HIV infection. (TR 373-74). Doe received three or four hateful phone calls while he was at work at the church and two or three at his home. (TR 373). In one particular phone call, Doe was told he was "an HIV riddled fagot and [his] bitch ass was to stay away from the kids." (TR 373). This was especially distressful for Doe, having been a victim of childhood sexual abuse himself, and he had only recently finalized a lawsuit relating to the abuse and begun to put it behind him. (TR 348; 375). Quest Diagnostics' disclosure of Doe's HIV test results to his employer and the events that followed were emotionally disturbing to Doe, causing him to become unable to leave his house and to have more frequent fears and concerns that his co-workers and other church members knew about his HIV infection. (TR 338; 341-44).

Procedural History

Doe brought this action in July 2008 and filed his Amended Petition on February 26, 2009. (LF 1, 12). On December 1, 2010, the trial court granted Quest's Motion for

Summary Judgment as to Doe's claim for Intentional or Negligent Infliction of Emotional Distress, and in all other respects, Quest's motion was denied. (LF 77-91). Of his remaining three counts, Doe elected to submit only two to the jury: (1) breach of fiduciary duty and (2) wrongful disclosure in violation of §191.656, RSMo.[2] On December 9, 2010, the jury found in favor of Quest Diagnostics on both counts and the Circuit Court of the City of St. Louis entered judgment in favor of Respondents, Quest Diagnostics. (LF 187-189). On January 7, 2011, Appellant Doe filed his Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial, (LF 273), which was denied by the Circuit Court on March 17, 2011. (A1). Appellant Doe timely filed his Notice of Appeal on March 24, 2011. (LF 274). On June 26, 2012, the Court of Appeals for the Eastern District affirmed the trial court's judgment in favor of Quest Diagnostics. On July 11, 2012, Appellant Doe filed with the Court of Appeals an application for transfer to the Supreme Court, which the Court of Appeals denied on August 7, 2012. Appellant then filed his application for transfer with this Court on August 22, 2012, which was granted on September 25, 2012.

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[2] At trial, Doe abandoned his claim for Invasion of Privacy (Count III).

POINTS RELIED ON

POINT 1. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL, BECAUSE INSTRUCTION NO. 6, THE VERDICT DIRECTOR SUBMITTED BY THE COURT ON APPELLANT'S CLAIM FOR BREACH OF FIDUCIARY DUTY, IMPROPERLY REQUIRED PROOF OF NEGLIGENCE, IN THAT NEGLIGENCE IS NOT AN ELEMENT OF A CLAIM FOR BREACH OF FIDUCIARY DUTY, THE INSTRUCTION MISLED, MISDIRECTED, AND/OR CONFUSED THE JURY, AND APPELLANT WAS THEREBY PREJUDICED.

Fierstein v. DePaul Health Center, 24 S.W.3d 220, 226 (Mo. App. E.D. 2000)

Brandt v. Medical Defense Associates, 856 S.W.2d 667, 674 (Mo. banc 1993)

Klemme v. Best, 941 S.W.2d 493 (Mo. banc 1997)

Costa v. Allen, 274 S.W.3d 461 (Mo. 2009)

POINT 2. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL, BECAUSE INSTRUCTION NO. 9, AN AFFIRMATIVE DEFENSE TO APPELLANT'S CLAIM OF WRONGFUL DISCLOSURE UNDER §191.656 RSMO., SHOULD NOT HAVE BEEN SUBMITTED BY THE COURT, IN THAT THERE WAS NO EVIDENCE TO SUPPORT THE AFFIRMATIVE DEFENSE THAT DOE EXECUTED A WRITTEN AUTHORIZATION TO DISCLOSE HIS CONFIDENTIAL HIV TEST RESULTS TO HIS EMPLOYER.

First State Bank of St. Charles v. Frankel, 86 S.W.3d 161, 173 (Mo. App. E.D. 2002)

Section 191.656 of the Missouri Revised Statutes

State ex rel. Proctor v. Messina, 320 S.W.3d 145 (Mo. 2010)

Health Information Portability and Accountability Act, 42 U.S.C. § 1320d-7(a)

POINT 3. THE TRIAL COURT ERRED WHEN IT GRANTED QUEST DIAGNOSTICS, INC.'S MOTION FOR DIRECTED VERDICT, BECAUSE THE EVIDENCE SUPPORTED HOLDING IT LIABLE FOR ITS OWN TORTIOUS CONDUCT AND THE TORTS OF ITS SUBSIDIARY, IN THAT QUEST DIAGNOSTICS, INC. WAS DIRECTLY INVOLVED IN THE UNAUTHORIZED DISCLOSURE OF DOE'S CONFIDENTIAL MEDICAL TEST RESULTS, AND IT MAINTAINED COMPLETE DOMINION OVER ITS SUBSIDIARY, CONTROLLING THE SUBSIDIARY'S EMPLOYEES, TRAINING, PROPERTIES, AND THE VERY POLICES AND BUSINESS PRACTICES GOVERNING THE DISCLOSURE OF DOE'S CONFIDENTIAL MEDICAL TEST RESULTS.

Mid-Missouri Telephone Co. v. Alma Telephone Co., 18 S.W.3d 578, 582 (Mo. App. 2000)

Central Cooling & Supply Co. v. Director of Revenue, 648 S.W.2d 546, 548 (Mo. 1982)

Collet v. American Nat'l Stores, Inc., 708 S.W.2d 273, 283 (Mo. App. 1986)

ARGUMENT

POINT 1. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL, BECAUSE INSTRUCTION NO. 6, THE VERDICT DIRECTOR SUBMITTED BY THE COURT ON APPELLANT'S CLAIM FOR BREACH OF FIDUCIARY DUTY, IMPROPERLY REQUIRED PROOF OF NEGLIGENCE, IN THAT NEGLIGENCE IS NOT AN ELEMENT OF A CLAIM FOR BREACH OF FIDUCIARY DUTY, THE INSTRUCTION MISLED, MISDIRECTED, AND/OR CONFUSED THE JURY, AND APPELLANT WAS THEREBY PREJUDICED.

A. Standard of Review

When reviewing whether a jury was properly instructed, the appellate court's review is *de novo*. Myers v. Farm Bureau Town & Country Ins. Co., 345 S.W.3d 341, 348 (Mo. App. E.D. 2011). An instruction shall be given or refused by the trial court according to the law and the evidence in the case. First State Bank of St. Charles v. Frankel, 86 S.W.3d 161, 173 (Mo. App. E.D. 2002) (*citing* Rule 70.02(a)). To reverse on grounds of instructional error, the party claiming instructional error must establish that the instruction at issue misdirected, misled, or confused the jury, and prejudice resulted from the error. Dhyne v. State Farm Fire and Cas. Co., 188 S.W.3d 454, 459 (Mo. banc 2006).

B. Instruction No. 6 Misstated the Law Because The Elements of a Breach of Fiduciary Duty Claim in This Instance Are (1) Disclosure of Confidential Information, (2) Without Consent, and (3) Sustained Damages.

The trial court erred in submitting, over Doe's objection, Instruction No. 6, the verdict director for Doe's claim of breach of fiduciary duty. Doe objected to the verdict director on the grounds that it misstated the law, in that it required Doe to prove that Quest acted *negligently* when it disclosed Doe's HIV test results to Doe's employer. (TR 509-521). Instruction No. 6, the verdict director on Doe's claim for breach of fiduciary duty, was submitted to the jury as follows:

> Instruction No. 6
>
> On the claim of Plaintiff for breach of fiduciary duty, your verdict must be for Plaintiff if you believe:
>
> First, defendant sent plaintiff's confidential lab results by facsimile to plaintiff's place of employment, without first obtaining plaintiff's consent to do so, and
>
> Second, in taking the action submitted in paragraph first, defendant *negligently* failed to protect the confidentiality of plaintiff's lab results, and
>
> Third, as a direct result of such *negligence*, plaintiff was damaged.
>
> The term "negligent" or "negligence" as used in this instruction means *the failure to use ordinary care*. The phrase

> "ordinary care" means that degree of care that an ordinarily careful person would use under the same of similar circumstances.

(A16; LF 228 (emphasis added)).

At trial, Doe submitted Instruction B to the court as the verdict director on his claim of breach of fiduciary duty, which was refused. (A21; LF 233; TR 519). Doe argued that this Court's holding in Fierstein v. DePaul Health Center, 24 S.W.3d 220, 226 (Mo.App. E.D. 2000) ("Fierstein II") set out the required elements of a claim of breach of fiduciary duty.[3] (TR 509-521).

Prior to its ruling in Fierstein II, the Court of Appeals addressed the elements of a claim of breach of fiduciary duty in Fierstein v. DePaul Health Center, 949 S.W.2d 90, 92 (Mo. App. E.D. 1997) ("Fierstein I"). In Fierstein I, the plaintiff brought an action against a hospital for the wrongful release of the plaintiff's medical records, alleging a breach of the fiduciary duty owed to her under the physician-patient privilege. The suit was filed after medical records reflecting the plaintiff's hospitalization were sent by the hospital directly to her ex-husband's attorney instead of complying with the subpoena, which required the hospital's custodian of records to appear and produce the records at a deposition a week later. The trial court granted summary judgment in favor of the

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[3] When there is no MAI instruction, an instruction must conform to the theory of MAI; it must follow the substantive law. Ahrens & McCarron, Inc. v. Mullenix Corp., 793 S.W.2d 534, 541 (Mo.App. E.D. 1990).

hospital as to plaintiff's claim for breach of fiduciary duty. On appeal, the Court cited this Court's holding in Brandt v. Medical Defense Associates, 856 S.W.2d 667, 674 (Mo. banc 1993), noting that a physician has a fiduciary duty of confidentiality not to disclose any medical information received in connection with the treatment of a patient. Fierstein I, 949 S.W.2d at 92. Because medical records are included under the physician-patient privilege, a plaintiff may maintain an action for damages in tort against the physician where the physician discloses any information without first obtaining the patient's waiver. Id. (*citing* Leritz v. Koehr, 844 S.W.2d 583, 584 (Mo. App. E.D. 1993) *and* Brandt, 856 S.W.3d at 674). The Fierstein I Court reversed and remanded the matter for trial, finding that the plaintiff had alleged sufficient facts to support her claim for breach of fiduciary duty. Id.

In Fierstein II, the defendant hospital appealed the trial court's judgment after the jury found for the plaintiff on her claim for breach of fiduciary duty. The hospital argued that the trial court erred when it submitted Instruction No. 5, plaintiff's verdict director on her claim of breach of fiduciary duty, because the verdict director should have contained an additional element. At trial, the court approved the following verdict director on plaintiff's breach of fiduciary duty claim:

> Instruction No. 5
>
> Your verdict must be for Plaintiff if you believe:
>
> First, Defendant disclosed Plaintiff's hospital records to attorneys for [husband], and

Second, Defendant made such disclosure without first obtaining Plaintiff's consent to do so, and

Third, as a direct result of such disclosure, Plaintiff sustained damage.

Fierstein, 24 S.W.3d at 226. The hospital argued that the trial court erred when it refused to include the phrase "as a direct result of such disclosure prior to the July 15 record custodian's deposition" in the third paragraph of the verdict director. Id. at 225. On appeal, the Court held:

> The verdict director complied with the directive of this court about what elements were necessary to make a submissible case in Fierstein I. This court stated that "if a physician discloses any information, without first obtaining the patient's waiver, then the patient may maintain an action for damages in tort against the physician." Fierstein I, 949 S.W.2d at 992. The trial court did not err in submitting Instruction No. 5, plaintiff's verdict director, to the jury.

Fierstein II, 24 S.W.3d at 225 (*citing* Fierstein I, 949 S.W.2d at 92).

Appellant Doe's submission of Instruction B to the trial court as the verdict director on his claim of breach of fiduciary duty was consistent with the Court's ruling in Fierstein II, in that it properly instructs the jury as to the elements of a breach of fiduciary duty, while Instruction No. 6, the verdict director actually submitted to the jury, does not. (A16, A21; LF 228, 233; TR 519). Doe should have been required only to prove that Quest Diagnostics (1) disclosed confidential information, (2) without his consent, and (3)

as a result of such disclosure, Doe sustained damages. Instruction No. 6 improperly required Doe to prove that Quest acted *negligently* when it disclosed Doe's HIV test results to Doe's employer, yet no such requirement exists under Missouri law. (A16; LF 228; TR 509-21). Accordingly, Doe respectfully requests that this Court reverse the trial court and remand for a new trial.

C. Missouri Does Not Require Proof of Negligence in an Action for Breach of Fiduciary Duty, Thus Instruction No. 6 Improperly Heightened Doe's Burden of Proof and Misled The Jury, Causing Prejudice to Doe.

In this case, quite shockingly, Quest Diagnostics mischaracterized the law and misled the trial court when it argued that *negligence* is an element of a breach of fiduciary duty claim. (TR 509-21). Defendants advised the trial court that Koger v. Hartford Life Ins. Co., 28 S.W.3d 405 (Mo. App. W.D. 2000), supported their contention that a negligence element should be incorporated into the verdict director on Doe's claim for breach of fiduciary duty. (TR 516-18). Koger, however, says *nothing* about "negligence" being an element of a claim for breach of fiduciary duty.[4]

In Koger, after several of plaintiff's claims were dismissed by the trial court, plaintiff appealed to the Western District Court of Appeals, arguing that the trial court

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[4] The word "negligent" appears only three times in Koger, and on each occasion the court refers to plaintiff's claim for "negligent misrepresentation" and not in the context of a claim for breach of fiduciary duty. Incidentally, the words "negligence" and "negligently" are absent from the opinion entirely. Koger, 28 S.W.3d at 408, 414.

committed numerous errors.[5] In addressing plaintiff's argument that the trial court erred when it dismissed his claim for breach of fiduciary duty, the court explained that to adequately state a claim for breach of fiduciary duty, a plaintiff must plead: (1) the existence of a fiduciary relationship between the parties, (2) a breach of that fiduciary duty, (3) causation, and (4) harm. Koger, 28 S.W.3d at 410 (*citing* Preferred Physicians Mutual Mgmt. Grp. v. Preferred Physicians Mutual Risk Retention, 918 S.W.2d 805, 811 (Mo. App. W.D. 1996)). In affirming the trial court's dismissal of plaintiff's breach of fiduciary duty claim, the court held:

> This court cannot determine what Koger is asserting as a breach of any fiduciary duty. The pleadings are void on this point. Additionally, after failing to properly plead breach of duty, Koger could not and did not plead causation. Finally, Koger made no connection between a supposed fiduciary duty arising out of Hartford's investment powers and any harm Koger has suffered. Koger did not properly assert a claim for breach of fiduciary duty. The petition was insufficient, and the trial court did not err in dismissing that claim.

Koger, 28 S.W.3d at 410.

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[5] In Koger, the plaintiff appealed the judgment of the trial court denying plaintiff's motion for class certification, dismissing his claims for breach of fiduciary duty, fraud, and breach of duty of good faith and fair dealing, and denying him leave to file an amended petition. Koger, 28 S.W.3d at 407-09.

Perhaps most notably, this Court has expressly addressed the required elements in a claim of breach of fiduciary duty and its contrast to tort principles measured by a standard of care. In Klemme v. Best, 941 S.W.2d 493 (Mo. banc 1997), this Court specifically held that a claim of breach of fiduciary duty is distinguishable from a claim of negligence. Id. at 495. In recognizing the difference between a claim for legal malpractice and one for breach of fiduciary duty, the Court noted the rationale for differing elements: "[A] breach of the standard of care is negligence, and a breach of fiduciary obligation is constructive fraud." Id. (*citing* LEGAL MALPRACTICE, § 8.10 at 600; *and* Gardine v. Cottey, 230 S.W.2d 731, 739 (Mo. banc 1950)).

Klemme arose out of a federal suit against the city of Columbia and several police officers, including Klemme. Id. at 493. The federal court dismissed Klemme with prejudice after determining that the facts did not support a claim against him. Klemme then sued his attorney, Robert Best, who had originally represented all defendants in the case, alleging that Best placed the interests of the City and its insurer above Klemme's interests, and had thus breached his fiduciary duty to Klemme. The Supreme Court concluded:

> Klemme has alleged facts that constitute the tort breach of fiduciary duty or constructive fraud against his attorney; Best and Klemme had an attorney-client relationship; Best breached his fiduciary obligation by placing the interests of other clients before Klemme's; this breach proximately caused Klemme damages; no other recognized tort

encompasses Klemme's claim. The circuit court erred in finding that Klemme's petition failed to state a claim.

Id. at 496.

Similarly, in Costa v. Allen, 274 S.W.3d 461 (Mo. 2009), this Court once again addressed the required elements in a claim of breach of fiduciary duty and its contrast to tort principles measured by a standard of care. Id. at 462. In Costa, the plaintiff, acting *pro se*, sued the former public defender who represented him unsuccessfully in a post-conviction action, alleging breach of fiduciary duty after the public defender failed to obtain and secure certain witnesses at an evidentiary hearing. The plaintiff argued that the public defender's failure to call the witnesses doomed the client's otherwise valid post-conviction claim. The trial court dismissed plaintiff's *pro se* petition without granting leave to amend and without elaboration, and plaintiff appealed. Id. On appeal, this Court specifically noted that "[a]n attorney's fiduciary duties equate specifically to loyalty and confidentiality, in contrast to contractual obligations or the duty of due care." Id. The plaintiff denied his action was one for legal malpractice or that it invoked principles measured by the standard of care. Id. at 463, n.4. Thus, this Court held that because plaintiff's petition alleged no violation of the public defender's "basic fiduciary obligations of undivided loyalty and confidentiality" the plaintiff's petition failed to state

a claim upon which relief can be granted. Id. at 463 (*citing* Klemme, 941 S.W.2d at 495).[6]

In this case, substantial evidence at trial was adduced in support of Doe's proposed Instruction B, yet, over Doe's objection, Instruction No. 6 was the verdict director actually submitted to the jury. Instruction No. 6 misstated the law and required Doe to prove that Quest Diagnostics was *negligent* in its fiduciary duty when no such requirement exists under Missouri law. Any suggestion that the negligence element in Instruction No. 6 somehow lessened Doe's burden of proof defies logic. Common sense dictates that any time an additional element is incorporated into a legal test, it is yet another requirement that must be overcome by the party possessing the burden of proof. Under Missouri law, Doe should have only been required to prove that Quest Diagnostics (1) disclosed confidential information, (2) without his consent, and (3) as a result of such disclosure, Doe sustained damages. The additional element of negligence incorporated into Doe's claim for breach of fiduciary duty improperly heightened Doe's burden of proof on the claim and misled the jury as to what is required for a showing of a breach of fiduciary duty, resulting in prejudice to Doe. Accordingly, this Court should reverse the trial court and remand for a new trial.

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[6] Despite its ruling regarding plaintiff's failure to properly plead a breach of fiduciary duty claim, the Costa Court ultimately vacated the judgment and remanded the case, because the trial court failed to freely grant plaintiff leave to amend his petition pursuant to Rule 67.06.

D. The Court of Appeals Incorrectly Held That Doe Failed to Establish That Quest Owed Him a Fiduciary Duty of Confidentiality.

The Eastern District Court of Appeals below held that Doe failed to establish that Quest Diagnostics owed him a fiduciary duty of confidentiality, and thus, never addressed the merits of Doe's arguments relating to fiduciary duty. (*Memorandum,* p. 8 (A33)). While the Court below recognized that a fiduciary relationship exists when "one person is under a duty to act for the benefit of the other on matters within the scope of the relationship," and usually arises in situations "when one person places trust in the faithful integrity of another," or "when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer," it stated that no such duty exists between a medical testing laboratory and the patient who is the subject of the medical tests. (*Memorandum,* p.7-8 (A32-33)). Whether a fiduciary duty exists is a question of law, and the breach of that duty is for the trier of fact to decide. Western Blue Print Co., v. Roberts, 367 S.W.3d 7, 12 (Mo. 2012) (*citing* Scanwell Freight Express STL, Inc., v. Chan, 162 S.W.3d 477, 481 (Mo. banc 2005)). Under the facts of this case and the applicable law, however, Respondents clearly owed Doe a fiduciary duty of confidentiality.

Respondents, in the ordinary course of their business as a clinical laboratory, receive and transmit confidential medical information. Doe alleged in his Amended Petition, and Respondents admitted in their Answer, that "Defendants are health care providers." (LF 18, ¶ 41; LF 280). At trial, the Operations Director for Quest Diagnostics, Inc., Doug Hamilton, testified that Quest has established policies and

business practices for protecting the disclosure of confidential information and admitted that Quest is responsible for protecting the private health information of its patients through its Notice of Privacy Practices. (TR 287, 289-90; LF 212-15). In its Notice of Privacy Practices, Respondents make the following promise to their patients:

> Quest Diagnostics Incorporated and its wholly owned subsidiaries . . . are committed to protecting the privacy of your personal and health information. . . . At Quest Diagnostics, we are committed to protecting the confidentiality of individuals' laboratory test results and other patient protected health information (PHI) that we collect or create as part of our diagnostic testing activities.

(LF 212).

As stated, *supra,* this Court recognized in Brandt that a physician has a fiduciary duty of confidentiality not to disclose any medical information received in connection with his treatment of a patient. 856 S.W.2d at 674. This Court specifically held:

> We hold that a physician has a fiduciary duty of confidentiality not to disclose any medical information received in connection with the treatment of the patient. We further hold that if any such information is disclosed under circumstances where this duty of confidentiality has not been waived, the patient has a cause of action for damages in tort against the physician.

Id.

Similarly, the Eastern District Court of Appeals held in Fierstein I and Fierstein II that the same kind of duty applies to a hospital. 949 S.W.2d at 92; 24 S.W.3d at 226. In

determining that a health care provider has a duty of confidentiality not to disclose any medical information without the patient's permission, the Fierstein I and Fierstein II courts held that the hospital breached its fiduciary duty of confidentiality when it released medical records which were subject to a subpoena before the deposition date stated on the subpoena, depriving the patient the opportunity to dispute the release of the records. Id. Thus, as health care providers who routinely deal with private medical information and who provide formal notice to patients that they are committed to protecting the privacy of their medical information, Respondents have the same fiduciary duty of confidentiality as physicians and hospitals.

The duty to protect confidential information is not limited to the holder of that information being an attorney, financial advisor, or even a health care provider. An employer, for example, has a duty to safeguard the personnel files of its employees. *See generally,* State ex rel. Delmar Gardens v. Gaertner, 239 S.W.3d 608 (Mo. banc 2007) (employment records are protected by a right of privacy and are discoverable only insofar as they relate to matters put at issue in the pleadings). This Court held in State ex rel. Crowden v. Dandurand, 970 S.W.2d 340, 343 (Mo. banc 1998) that a plaintiff has a fundamental right of privacy in his/her employment records. This principle was reaffirmed when this Court stated, "Missouri recognizes a right of privacy in personnel records that should not be lightly disregarded or dismissed." Delmar Gardens , 239 S.W.3d at 611. Discovery of confidential personnel records should be limited to information that relates to matters put at issue in the pleadings, especially when it concerns sensitive personal information. Id. (*citing* State ex rel Madlock v. O'Malley, 8

S.W.3d 890, 891 (Mo. banc 1999)). More specifically, in Madlock, this Court held that a request directed to the records of the plaintiff was too broad. Id. (holding that request for "any and all information . . . . concerning plaintiff's employment is impermissibly overbroad."). In Delmar Gardens, this Court stated that "[p]articular care must be taken to avoid excessive intrusiveness where, as here, the records are sought only for the collateral purpose of potentially impeaching a witness." 239 S.W.3d at 609 (finding respondent, J. Gaertner, abused his discretion in ordering the disclosure of entire personnel file). *See also* Madlock, 8 S.W.3d 890, 891 (the right is not absolute and any discovery that is permitted of confidential personnel records must be "limited to information that relates to matters put at issue in the pleadings"). In Delmar Gardens, this Court relied on the premise in Fierstein II that the "[d]isclosure of confidential information . . . . could subject [the discloser] to liability under Missouri law—a concrete injury." 239 S.W.3d at 611 (*citing* Fierstien v. DePaul Hospital, 24 S.W.3d 220, 223 (Mo. App. E.D. 2000)).

More recently, in Western Blue Print Co., v. Roberts, 367 S.W.3d 7, 16 (Mo. 2012), this Court addressed an employer's claim that its employee had breached her fiduciary duty of confidentiality even though she was not bound by a non-compete agreement or a confidentiality agreement. In declining to extend the law of fiduciary duty to at-will employees, this Court held that to establish a confidential relationship between an employer and an employee, "[t]here must be either an express understanding as to the confidential nature of the information or it must be acquired under such circumstances that the employee must necessarily be aware of the confidence reposed in

him." (*citing* Walter E. Zemitzsch v. Harrison, 712 S.W.2d 418, 421 (Mo. App. E.D. 1986) and Nat'l Rejectors Inc. v. Trieman, 409 S.W.2d 1, 41 (Mo. banc 1966)). But unlike Western Blue Print Co., Respondents here expressly acknowledged the confidential nature of blood test results and the confidence placed in them in acquiring such information when they admitted at trial that Quest has established policies and business practices for protecting the disclosure of confidential information and that Quest is responsible for protecting the private health information of its patients through its Notice of Privacy Practices. (TR 287, 289-90; LF 212-15). In admitting that they are responsible for protecting the confidential medical information of its patients, Respondents acknowledge that the wrongful disclosure of such information should subject them to liability under Missouri law—a concrete injury. Delmar Gardens, 239 S.W.3d at 611; Fierstien II, 24 S.W.3d at 223.

Respondents' duty of confidentiality *also* arises from federal and state statutes. Under federal law, HIPAA clearly requires Respondents to maintain the privacy of patients' medical information. In State ex rel. Proctor v. Messina, 320 S.W.3d 145, 150 (Mo. 2010), this Court stated:

> In HIPAA, Congress directed the Secretary to promulgate rules and regulations designed to ensure the privacy of patients' medical information. 42 U.S.C.A. §1320d-2(d)(2)(A) . . . . Specifically, the Secretary defined protected 'health information' as:
>
> > [A]ny information, whether oral or recorded in any form or medium, that:

> (1) Is created or received by a health care provider, . . . ; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; . . . . 45 C.F.R. § 160.103.

320 S.W.3d at 150.

In addition, under state law, all information "concerning an individual's HIV infection status or the results of any individual's HIV testing shall be strictly confidential and shall not be disclosed except . . . [p]ursuant to the written authorization of the subject of the test result or results." §§191.656.1-191.656.2(c), RSMo.

At trial, Doe argued, and the trial court agreed, that Quest did, in fact, owe a fiduciary duty of confidentiality to Doe (SLF 548; TR 127-28, 473-74). Moreover, Respondents did not request an instruction requiring that the jury find they owed a fiduciary duty. (TR 511-20). In the introductory paragraphs to their argument about the fiduciary duty claim, Respondents state: "The Court need not address whether a diagnostic laboratory owes a fiduciary duty of confidentiality in a generalized sense to rule on the particular issue raised in this appeal." (Resp. Brief, p. 25). Yet, fourteen pages later, without citing to any case law or other authority, Respondents assert:

> Appellant failed to establish the existence of a fiduciary duty of confidentiality under the circumstances presented in this matter, or what the appropriate contours of that duty would be. Therefore, a directed verdict should have been entered in Respondents' favor, in which case no instructions would have been given to the jury.

(Resp. Brief, p. 39). The above passage is the entire argument presented by Respondents on the issue whether a fiduciary duty was owed to Doe, and it is a position that is in clear contradiction to the facts of this case, procedural history, and the applicable law. Quite clearly, Quest was under a duty to act for the benefit of Doe on matters within the scope of their relationship, and that duty arose because Doe placed trust in the faithful integrity of Quest. Their relationship and the duty owed to Doe by Quest is indeed comparable to the relationships that have traditionally been recognized as involving fiduciary duties, such as a physician and a patient, a lawyer and a client, or a stockbroker and a customer.

Based on the foregoing, this Court should find that (1) Respondents did, in fact, owe Doe a fiduciary duty of confidentiality and (2) the trial court erred by submitting Instruction No. 6 to the jury, which incorrectly required proof of negligence in Doe's claim for breach of fiduciary duty. Accordingly, this Court should reverse the trial court and remand for a new trial.

POINT 2. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL, BECAUSE INSTRUCTION NO. 9, AN AFFIRMATIVE DEFENSE TO APPELLANT'S CLAIM OF WRONGFUL DISCLOSURE UNDER §191.656 RSMO. SHOULD NOT HAVE BEEN SUBMITTED BY THE COURT, IN THAT THERE WAS NO EVIDENCE TO SUPPORT THE AFFIRMATIVE DEFENSE THAT DOE EXECUTED A WRITTEN AUTHORIZATION TO DISCLOSE HIS CONFIDENTIAL HIV TEST RESULTS TO HIS EMPLOYER.

A. Standard of Review

When reviewing whether a jury was properly instructed, the appellate court's review is *de novo*. Myers v. Farm Bureau Town & Country Ins. Co., 345 S.W.3d 341, 348 (Mo. App. E.D. 2011). An instruction shall be given or refused by the trial court according to the law and the evidence in the case. First State Bank of St. Charles v. Frankel, 86 S.W.3d 161, 173 (Mo. App. E.D. 2002) (*citing* Rule 70.02(a)). An instruction, including an instruction submitting an affirmative defense, must be supported by substantial evidence. Frankel, 86 S.W.3d at 173 (upholding trial court's refusal of proffered affirmative defense instruction). Substantial evidence is that evidence which, if true, is probative of the issues and from which the jury can decide the case. Id. To reverse on grounds of instructional error, the party claiming instructional error must establish that the instruction at issue misdirected, misled, or confused the jury, and

prejudice resulted from the error. Dhyne v. State Farm Fire and Cas. Co., 188 S.W.3d 454, 459 (Mo. banc 2006).

B. There is No Evidence of Written Authorization Under § 191.656, RSMo.

The Circuit Court erred in submitting, over Doe's Objection, Instruction No. 9, Quest Diagnostics' affirmative defense to Doe's claim under § 191.656 RSMo., because there was no evidence to support the contention that Doe ever executed a written authorization for the disclosure of his confidential medical test results. At trial, Doe objected to the submission of Instruction No. 9 on the grounds that it was not properly pleaded and not supported by the evidence. (TR 526-29). Instruction No. 9 was submitted as follows:

> Instruction No. 9
>
> Your verdict must be for defendant on Plaintiff's claim submitted in Instruction No. 8, if you believe that defendant faxed the plaintiff's HIV lab results to 361-5358, pursuant to plaintiff's written authorization.

(A19; LF 231).

Instruction No. 8, as referred to in Instruction No. 9, *supra,* was Appellant's instruction for wrongful disclosure of § 191.656, RSMo., thus Instruction No. 9 was Respondents' affirmative defense to Instruction No. 8. (A18, 19; LF 230-31; TR 526-28).

The Missouri Legislature has declared: "All information . . . and records . . . concerning an individual's HIV infection status or the results of any individual's HIV

testing shall be strictly confidential and shall not be disclosed" unless the disclosure is made pursuant to certain specified exceptions. §191.656.1 RSMo 2010. (A2-A3). The exception upon which Quest Diagnostics relies in this case provides: "Pursuant to the written authorization of the subject of the test result or results." §191.656.2(1)(c), RSMo 2010. (A3). In order for Instruction No. 9 to have been properly submitted Quest was required to show substantial evidence supporting it. Frankel, 86 S.W.3d at 173. Substantial evidence is that evidence which, if true, is probative of the issues and from which the jury can decide the case. Id. Yet the undisputed evidence at trial established that Quest Diagnostics faxed Doe's HIV test results to his place of employment without his written authorization. There was no evidence that Doe executed a written authorization for Quest to disclose this information in the manner it did, nor was there evidence that Doe *orally* authorized Quest to disclose his HIV test results to his employer. There was no dispute that the notation on the requisition form, "faxed to 361-5358," was written by medical assistant, Faith Mustone, not Doe. (TR 219). Moreover, Mary Petty, the phlebotomist at the Quest facility, never questioned Doe about the accuracy of the notation before she interpreted it as a specific directive and thereafter entered it into the Quest computer system. (TR 451-53).

On this record, Doe properly objected to the submission of Instruction No. 9, arguing that it was unsupported by the pleadings and the evidence. (TR 526-29). Doe never actually wrote, or executed, a "written authorization" for the disclosure of his protected health information. Instead, Quest Diagnostics used the instruction to argue that the notation on the requisition form, "faxed to 361-5358," caused it to reasonably but

mistakenly believe that Doe's doctor wanted the test records faxed to the number noted. The jury was misled, because they were instructed that the notation "faxed to 361-5358" could have constituted a "written authorization" under § 191.656 RSMo., when no such evidence supported such a presumption. Because Doe was prejudiced by the error, he respectfully requests that this Court reverse the Circuit Court and require a new trial.

C. There is No Evidence of Written Authorization Under HIPAA

The Health Information Portability and Accountability Act, 42 U.S.C. § 1320d-7(a) ("HIPAA") also requires written authorization for the disclosure of confidential medical information. (A6). Because HIPAA preempts all contrary State laws that are less stringent than the privacy standards established by the Privacy Rule, Quest Diagnostics was not entitled to the affirmative defense of "written authorization." Quest Diagnostics did not demonstrate at trial sufficient evidence of a HIPAA compliant authorization, nor did Quest set forth any exception to the written authorization requirement.

In State ex rel. Proctor v. Messina, 320 S.W.3d 145 (Mo. 2010), the Missouri Supreme Court addressed HIPAA preemption, recognizing that under the Supremacy Clause of the United States Constitution, state laws that conflict with federal laws are preempted and have no effect. Proctor, 320 S.W.3d at 148 (Mo. 2010) (*citing* U.S. Const., Art. VI, cl. 2). The United States Supreme Court has cautioned that in the interest of preventing federal encroachment on the state's authority, a court interpreting a federal statute pertaining to areas traditionally controlled by state law should be reluctant to find

preemption. Id. Thus, federal law will preempt state law only when it is the clear and manifest purpose of Congress to do so. Id.

Congress, however, included an express preemption clause in HIPAA. 42 U.S.C. § 1320d-7(a). Thus, courts must construe the plain language of the statute to determine not whether, but rather the extent to which Congress intended for HIPAA to preempt a particular state law. Proctor, 320 S.W.3d at 148. ". . . Congress directed the Secretary [of the Department of Human Health and Services] to promulgate rules and regulations *designed to ensure the privacy of patients' medical information*." Proctor, 320 S.W.3d at 150 (emphasis in original). These regulations, collectively known as the "Privacy Rule," generally preempt State laws that are less stringent in their protection of private health information. Id. at 149 (*citing* 45 C.F.R. § 160.203); (A7). As explained by the Secretary, the Privacy Rule is intended to set minimum national standards for the use and disclosure of private health information:

> It is important to understand this regulation as *a new federal floor of privacy protections* that does not disturb more protective rules or practices . . . The protections are a *mandatory floor*, which other governments and any covered entity may exceed.

Department of Human Health and Services, *Standards for Privacy of Individually Identifiable Health Information*, 65 Fed. Reg. 82471 (Dec. 28, 2000).

The Proctor court noted that "[w]ith the overriding governing principle of patient privacy, the Secretary did, in fact, create regulations prohibiting health care providers from disclosing 'protected health information,' whether 'oral or recorded in any form or

medium,' unless medical providers comply with a narrow list of exceptions separately itemized by the Secretary elsewhere in the Secretary's regulatory scheme." Proctor, 320 S.W.3d at 150. One of the exceptions to nondisclosure under the Privacy Rule provides that a health care provider may disclose protected health information to third parties with a valid, written authorization of the patient. 45 CFR § 164.502(a)(1)(iv); (A9). The Privacy Rule, however, sets out numerous, detailed requirements for a valid written authorization, including: (i) a description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion; (ii) the name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure; (iii) the name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure; (iv) a description of each purpose of the requested use or disclosure; (v) an expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure; (vi) the signature of the individual and date. 45 CFR § 164.508(c)(1); (A10). In addition, the authorization must make certain statements, including, *inter alia*, the right of the patient to revoke the authorization, and the potential for re-disclosure of the information. 45 CFR § 164.508(c)(2); (A12).

Here, in the absence of more stringent authorization requirements under Missouri law,[7] the Privacy Rule is preemptive. Proctor, 320 S.W.3d at 148; 45 CFR §

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[7] Other courts have found preemption where State law provided less stringent requirements for the content of authorizations. *See* Smith v. American Home Prod.

164.508(c)(1). Even under HIPAA, which preempts the less stringent authorization requirements of §191.656, Quest was not entitled to the affirmative defense of "written authorization" because it did not demonstrate at trial sufficient evidence of a HIPAA compliant authorization, nor did Quest set forth any exception, *supra,* to the written authorization requirement. The mere notation of a fax number on a requisition form falls short of both the HIPAA standards for authorization and the requirements under § 191.656, RSMo. Therefore, the Circuit Court's submission of Instruction No. 9 was wholly unsupported, and it misled the jury as to what may constitute a "written authorization" under the law. The instruction was prejudicial to Doe, because it effectively relieved Quest Diagnostics of its burden of proof on its affirmative defense. Accordingly, Doe respectfully requests that this Court reverse the lower court and require a new trial.

D. The Court of Appeals Incorrectly Held That §191.656 Permits Persons Other Than The Subject to Authorize Disclosure of the Subject's Test Results.

The Court of Appeals below held that §191.656 permits persons other than the subject of a medical test to authorize the disclosure of the subject's medical test results. In interpreting §191.656, the Court of Appeals disregarded the plain language of the law, stating:

Corp., 855 A.2d 608, 624 (N.J. Super. 2003) (New Jersey law preempted under Privacy Rule).

> On its face, the phrase "the written authorization of the subject of the test result" does not require the written authorization be actually written or executed by the subject of the test, nor does the language rule out other means of providing a written authorization, such as by delivering a written authorization written by another.

(*Memorandum,* p. 11) (A36)). The Court's interpretation of §191.656 is contradicted by the plain language of the statute, which provides that all information "concerning an individual's HIV infection status or the results of any individual's HIV testing shall be strictly confidential and shall not be disclosed except . . . **[p]ursuant to the written authorization of the subject of the test result or results**." §§191.656.1-191.656.2(c), RSMo. (emphasis added). The lower Court's peculiar interpretation of the plain language of §191.656 would lead to absurd results that would be contrary to the purpose of the statute, which is to protect the confidentiality of an individual's HIV reports and records. If such an interpretation were adopted, Section 191.656—the HIV status confidentiality statute—would provide no meaningful confidentiality at all.

Based on the foregoing, this Court should find that (1) the plain language of §191.656.2(c) does, in fact, provide that an individual's HIV testing results shall not be disclosed except pursuant to the written authorization of the subject of the test results and (2) the trial court's submission of Instruction No. 9 was not supported by the evidence and misled the jury as to what may constitute a "written authorization" under Missouri law. Accordingly, this Court should reverse the trial court and remand for a new trial.

POINT 3. THE TRIAL COURT ERRED WHEN IT GRANTED QUEST DIAGNOSTICS, INC.'S MOTION FOR DIRECTED VERDICT, BECAUSE THE EVIDENCE SUPPORTED HOLDING IT LIABLE FOR ITS OWN TORTIOUS CONDUCT AND THE TORTS OF ITS SUBSIDIARY, IN THAT QUEST DIAGNOSTICS, INC. WAS DIRECTLY INVOLVED IN THE UNAUTHORIZED DISCLOSURE OF DOE'S CONFIDENTIAL MEDICAL TEST RESULTS, AND IT MAINTAINED COMPLETE DOMINION OVER ITS SUBSIDIARY, CONTROLLING THE SUBSIDIARY'S EMPLOYEES, TRAINING, PROPERTIES, AND THE VERY POLICIES AND BUSINESS PRACTICES GOVERNING THE DISCLOSURE OF DOE'S CONFIDENTIAL MEDICAL TEST RESULTS.

A. Standard of Review

In reviewing the grant of a motion for directed verdict, this Court "must determine whether the plaintiff made a submissible case . . . ." Dunn v. Enterprise-Rent-A-Car Co., 170 S.W.3d 1, 3 (Mo. App. 2005). "Whether the plaintiff made a submissible case is a question of law subject to de novo review." D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co., 316 S.W.3d 899, 905 (Mo. banc 2010). "A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." Investors Title Co. v. Hammonds, 217 S.W.3d 288, 299 (Mo. banc 2007). "An appellate court views the evidence in the light most favorable to the plaintiff to

determine whether a submissible case was made . . . ." Tune v. Synergy Gas Corp., 883 S.W.2d 10, 13 (Mo. banc 1994).

B. Quest Diagnostics, Inc. is Liable for its Own Tortious Conduct.

The Circuit Court erred when it granted Quest Diagnostics, Inc.'s motion for directed verdict, dismissing it as a defendant in the case, because the evidence supported holding it liable for its own tortious conduct—the unauthorized disclosure of plaintiff's confidential medical test results.

The evidence adduced at trial supported Doe's contention that Quest Diagnostics, Inc. was directly involved in the unauthorized disclosure of plaintiff's confidential medical test results. First, Quest Diagnostics Incorporated's 2007 Annual Report, including its Form 10-K to the SEC, indicates that it owns the facilities and employs the people who work for Quest. (LF 217-25). Second, the computer generated form upon which the phlebotomist inserted the directive, "FAX to 361-5358," which caused the fax to be sent, was a "Quest Diagnostics Incorporated" form. (LF 201-02). Third, all four pages of the faxes themselves indicate they were sent from "Quest Diagnostics Incorporated." (LF 208-11). Fourth, Both Stella Grodzinskaya and Doug Hamilton, the supervisors over the individuals who caused the fax to be generated by the Care 360 computer system and sent to Doe's employer, testified that they were employed by Quest Diagnostics, Inc. (TR 241; 287).[8] Notably, Ms. Grodzinskaya's business card

[8] In its oral argument in support of its Motion for Directed Verdict, Quest advised the trial court, despite the clearly conflicting testimony of its own employees, that there

specifically indicates that her employer is Quest Diagnostics, Inc., (LF 216), and Ms. Grodzinskaya supervised Mary Petty, a Quest Diagnostics Clinical Laboratories employee. (TR 241). Fifth, Ms. Grodzinskaya also testified that the Quest Diagnostics, Inc. sales department is required to train the employees of the doctors with whom the laboratories do business regarding the proper way to complete Quest Diagnostics requisition forms. (LF 242-43). Finally, the Notice of Privacy Practices indicates it was copyrighted by "Quest Diagnostics Incorporated," and employees of Quest Diagnostics, Inc. admit the company is responsible for protecting the private health information of its patients pursuant to its Notice of Privacy Practices. (LF 212-15; TR 289-90 & 303-07).

The trial court erred in granting a directed verdict, because in viewing the evidence in the light most favorable to the plaintiff, a submissible case as to the liability of Quest Diagnostics, Inc. was overwhelmingly supported by the legal and substantial evidence.

C. Quest Diagnostics, Inc. is Liable for the Torts of its Subsidiary.

Even if this Court finds that a submissible case was not made regarding Quest Diagnostics, Inc.'s direct involvement in the unauthorized disclosure of Doe's confidential medical information, a submissible case was made regarding Quest Diagnostics, Inc.'s liability for the torts of its subsidiary. The evidence clearly showed that Quest Diagnostics, Inc., was not just the parent company that owned the subsidiary, Quest

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was no evidence the employees identified in this case "are employed by anybody other than Quest Diagnostics Clinical Laboratories." (TR 432).

Diagnostics Clinical Laboratories, but that it maintained complete control and dominion over its subsidiary, such that the parent company controlled the subsidiary's employees, training, properties, and the very policies and business practices relating to the transaction at issue—the unauthorized disclosure of Doe's confidential medical test results—and is thus liable for the torts of its subsidiary.

Under Missouri law, there is a presumption of corporate separateness, and courts do not lightly disregard the corporate form to hold a parent company liable for the torts of a subsidiary. Mid-Missouri Telephone Co. v. Alma Telephone Co., 18 S.W.3d 578, 582 (Mo. App. 2000). Missouri law will protect the separate legal identities of two corporations, even when one corporation owns a part or all of the other. Id. (*citing* Central Cooling & Supply Co. v. Director of Revenue, 648 S.W.2d 546, 548 (Mo. 1982). Missouri courts may "pierce the corporate veil" and ignore the separate formal corporate structures, holding the parent corporation liable for the torts of its subsidiary. Such circumstances are present "only where there is such dominion and control that the controlled corporation had no separate mind, will or existence of its own and is but an alter ego for its principle." Id. (*citing* Grease Monkey Intern., Inc. v. Godat, 916 S.W.2d 257, 262 (Mo. App. E.D. 1995)); *see also* Radaszewski v. Contrux, Inc., 891 F.2d 672 (8th Cir. 1989) (*citing* Collet v. American Nat'l Stores, Inc., 708 S.W.2d 273, 283 (Mo. App. 1986)).

Missouri courts have established three requirements for piercing the corporate veil. First, the party seeking to prove that two corporations are not separate entities must show control by one corporation over the other. Radaszewski v. Contrux, Inc., 891 F.2d

at 673 (*citing* Collet, 708 S.W.2d at 283). "Control" in this context means "complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." Id. Second, such control must have been used to commit fraud, wrong, a violation of a statutory or other legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights. Id. Finally, the control and breach of duty must have proximately caused the injury of which plaintiff complains. Id. *See also* Mobius Mgmt. Sys. v. W. Physician Search, L.L.C., 175 S.W.3d 186 (Mo. App. E.D. 2005).

In this case, the evidence adduced at trial was in overwhelming support of Doe's contention that Quest Diagnostics, Inc. maintains complete domination over Quest Diagnostics Clinical Laboratories, not only of the subsidiary's finances, but of its policies and business practices. For the same reasons this Court should find that Quest Diagnostics, Inc. was directly involved in the unauthorized disclosure of Doe's confidential medical test results, this Court should also find that the parent company is liable for the torts of the subsidiary. Quest Diagnostics Incorporated's 2007 Annual Report, including its Form 10-K to the SEC, indicate that it owns the facilities and employs the people who work for Quest. (LF 0217-0225). The computer generated form upon which the phlebotomist inserted the directive, "FAX to 361-5358," which caused the fax to be sent, was a "Quest Diagnostics Incorporated" form, and all four pages of the faxes themselves indicate they were sent from "Quest Diagnostics Incorporated." (LF 201-202, 208-211). Both Stella Grodzinskaya and Doug Hamilton testified that they

were employed by Quest Diagnostics, Inc. and were the supervisors over the individuals who caused the fax to be generated by the Care 360 computer system and sent to Doe's employer. (TR 241; 287). Ms. Grodzinskaya's business card specifically indicates that her employer is Quest Diagnostics, Inc., (LF 0216), and Ms. Grodzinskaya supervised Mary Petty, a Quest Diagnostics Clinical Laboratories employee. (TR 241). Ms. Grodzinskaya also testified that the Quest Diagnostics, Inc. sales department is required to train the employees of the doctors with whom the laboratories do business regarding the proper way to complete Quest Diagnostics requisition forms. (LF 242-243). Finally, the Notice of Privacy Practices indicates it was copyrighted by "Quest Diagnostics Incorporated," and employees of Quest Diagnostics, Inc. admit the company is responsible for protecting the private health information of its patients pursuant to its Notice of Privacy Practices. (LF 212-15; TR 289-90 & 303-07).

The trial court erred in granting a directed verdict, because in viewing the evidence in the light most favorable to the plaintiff, a submissible case as to the liability of Quest Diagnostics, Inc. was overwhelmingly supported by the legal and substantial evidence. Quest Diagnostics, Inc. maintained control over its subsidiary, in that it controlled training, employees, properties, and the very policies and business practices at issue—the unauthorized disclosure of Doe's confidential medical test results. Quest Diagnostics, Inc. was directly involved in the transmission of the fax through its own employees, facilities, forms, and computer system, gave its subsidiary express or apparent authority to act on its behalf, and held itself out as being responsible for protecting the private health information of its patients through its policies and business

practices. Quest Diagnostics' control and subsequent breach of duty to Doe caused Doe injury, namely emotional distress. In this, the subsidiary had no separate mind, will or existence of its own, and Quest Diagnostics is thus liable for the torts of its subsidiary. Because a submissible case as to the liability of Quest Diagnostics, Inc., was supported by the legal and substantial evidence, the trial court erred in granting Quest's Motion for Directed Verdict and should be reversed.

CONCLUSION

For all the foregoing reasons, the erroneous decisions made at trial by the Circuit Court should be reversed and this matter remanded to the Circuit Court of the City of Saint Louis, Missouri for further proceedings, allowing Appellant to pursue his claims of breach of fiduciary duty, wrongful disclosure under § 191.656, RSMo., against all named Respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 15, 2012, a copy of the foregoing was served by the Court's electronic filing system or by electronic mail, upon counsel for Respondents:

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing Substitute Brief of Appellant complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 11,987 words as determined by MS Word. The foregoing Brief includes all the information required by Supreme Court Rule 55.03.

Dated: October 15, 2012

/s/ Bridget L. Halquist
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